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In the Supreme Court of the United States

OCTOBER TERM, 1957

ELOISE ARMS FORSTEL, AS ASSIGNEE OF STATE BANK AND TRUST COMPANY, EXECUTOR, PETITIONER

v.

E. J. SAUBER, DIRECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. 20–24) is reported at 249 F. 2d 379. The memorandum of the District Court (R. 18–19),[1] and its findings of fact and conclusions of law (Pet. 15–19; R. 19–23), are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered November 4, 1957 (Pet. 20). The petition for a writ of certiorari was filed February 1, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

[1] Record references herein are to the printed record appendix to the petitioner's brief in the court below.

QUESTION PRESENTED

Whether the values of two survivorship annuity contracts purchased by the decedent during her lifetime are includible in her gross estate under Section 811 (c) (1) (B) of the Internal Revenue Code of 1939.

STATUTE INVOLVED

Section 811 (c) of the Internal Revenue Code of 1939, as amended, provides:

> SEC. 811. GROSS ESTATE.
>
> The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—
>
> * * * * *
>
> (c) [As amended by Sec. 7 (a) of the Act of October 25, 1949, c. 720, 63 Stat. 891; Sec. 501 (b) (1) of the Revenue Act of 1950, c. 994, 64 Stat. 906, and Sec. 207 (a) of the Technical Changes Act of 1953, c. 512, 67 Stat. 615] *Transfers in Contemplation of, or Taking Effect at, Death.*—
>
> (1) *General rule.*—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise—
>
> (A) in contemplation of his death; or
>
> (B) under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which

does not in fact end before his death (i) the possession or enjoyment of, or the right to the income from, the property, or (ii) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; or

(C) intended to take effect in possession or enjoyment at or after his death.

Subparagraph (B) shall not apply to a transfer made before March 4, 1931; nor shall subparagraph (B) apply to a transfer made after March 3, 1931, and before June 7, 1932, unless the property transferred would have been includible in the decedent's gross estate by reason of the amendatory language of the joint resolution of March 3, 1931 (46 Stat. 1516).

(2) *Transfers taking effect at death—transfers prior to October 8, 1949.* An interest in property of which the decedent made a transfer, on or before October 7, 1949, intended to take effect in possession or enjoyment at or after his death shall not be included in his gross estate under paragraph (1) (C) of this subsection unless the decedent has retained a reversionary interest in the property, arising by the express terms of the instrument of transfer and not by operation of law, and the value of such reversionary interest immediately before the death of the decedent exceeds 5 per centum of the value of such property. For the purposes of this paragraph, the term "reversionary interest" includes a possibility that property transferred by the decedent (A) may return to him or his estate, or (B) may be subject to a power of

disposition by him, but such term does not include a possibility that the income alone from such property may return to him or become subject to a power of disposition by him. The value of a reversionary interest immediately before the death of the decedent shall be determined (without regard to the fact of th decedent's death) by usual methods of valuation, including the use of tables of mortality and actuarial principles, pursuant to regulations prescribed by the Commissioner with the approval of the Secretary. In determining the value of a possibility that property may be subject to a power of disposition by the decedent, such possibility shall be valued as if it were a possibility that such property may return to the decedent or his estate.

(3) *Transfers taking effect at death—transfers after October 7, 1949.*—An interest in property transferred by the decedent after October 7, 1949, shall be included in his gross estate under paragraph (1) (C) of this subsection (whether or not the decedent retained any right or interest in the property transferred) if and only if—

(A) possession or enjoyment of the property can, through ownership of such interest, be obtained only by surviving the decedent; or

(B) under alternative contingencies provided by the terms of the transfer, possession or enjoyment of the property can, through ownership of such interest, be obtained only by surviving the earlier to occur of (i) the decedent's death or (ii) some other event; and

such other event did not in fact occur during the decedent's life.

Notwithstanding the foregoing sentence, an interest so transferred shall not be included in the decedent's gross estate under paragraph (1) (C) of this subsection if possession or enjoyment of the property could have been obtained by any beneficiary during the decedent's life through the exercise of a power of appointment (as defined in section 811 (f) (2)) which in fact was exercisable immediately prior to the decedent's death.

* * * * *

(26 U. S. C. 811.)

STATEMENT

The facts as stipulated were found by the District Court (Pet. 15–18; R. 14–17). The decedent, Mrs. Elizabeth Arms, died testate on October 25, 1951, a resident of Evanston, Illinois. In December 1948 and in April 1949, she had purchased two single-premium survivorship annuity contracts, one from Travelers' Insurance Company for a premium of $38,872.13, and one from John Hancock Mutual Life Insurance Company for a premium of $38,872.50. Under each, she was to receive an annuity of $125 per month during her lifetime and, upon her death, her daughter, Eloise Arms Forster (the petitioner), was to receive the annuity until her death, and at the death of the survivor of the two, all obligations of the company under these contracts would cease. The value of the survivorship annuity at date of decedent's death is not in issue.

In the estate tax return filed for the decedent's estate, the executor included in the value of her gross estate the sum of $19,963.50 on account of the survivorship annuity contract with Travelers' Insurance Company and $20,373 on account of the John Hancock Mutual Life Insurance Company contract. The executor thereafter filed gift tax returns for the decedent for 1948, including the Travelers' Insurance Company contract, and for 1949, including the John Hancock Mutual contract, and gift taxes thereon were paid.

A claim was filed for refund of the estate tax paid on account of inclusion of the value of these annuity contracts in the gross estate of the decedent. The Commissioner of Internal Revenue, rejecting the contention that the survivorship annuity contracts should be excluded, denied the claim for refund, but in assessing an additional estate tax liability the Commissioner allowed credit for gift taxes paid with respect to these survivorship contracts. This suit was brought by petitioner to recover the difference between the amount of estate tax paid on account of the inclusion of the value of the annuity contracts in the gross estate of the decedent and the amount credited against the estate tax as erroneous overpayments of gift taxes with respect to such contracts.

The District Court gave judgment for the Commissioner (Pet. 19) and the Court of Appeals unanimously affirmed (Pet. 20–24).

ARGUMENT

The purchase by the decedent of single premium survivorship annuity contracts providing a life an-

nuity to herself plus an annuity to the surviving annuitant is a transfer of property within the meaning of Section 811 (c) (1) (B) of the 1939 Code, as amended (*supra*, pp. 2–3), under which the decedent retained for her life the income therefrom. The courts have consistently so held. *Commissioner* v. *Clise*, 122 F. 2d 938 (C. A. 9th), certiorari denied, 315 U. S. 821; *Mearkle's Estate* v. *Commissioner*, 129 F. 2d 386 (C. A. 3d); *Grant* v. *Smyth*, 123 F. Supp. 771 (N. D. Calif.), affirmed *per curiam*, 226 F. 2d 407 (C. A. 9th); *United States Trust Co. of New York* v. *Higgins*, 56 F. Supp. 997 (S. D. N. Y.); *Stewart's Estate* v. *United States*, 116 F. Supp. 752 (D. Minn.). See also *Commissioner* v. *Wilder's Estate*, 118 F. 2d 281 (C. A. 5th), certiorari denied, 314 U. S. 634.

None of the authorities referred to as creating "conflicts between the various circuits" (Pet. 10) is to the contrary and the petitioner is incorrect in asserting (Pet. 13) that the law is "in a hopeless state of confusion." Petitioner relies upon the legislative evolution of Section 811 (c), culminating in the amendment of that section by Section 7 of the so-called Technical Changes Act of 1949 (Act of October 25, 1949, c. 720, 63 Stat. 891), and the apparent overlapping as between paragraphs (B) and (C) of Section 811 (c) (1) in some situations such as that here involved. But petitioner misconceives the significance of the evolution and the purpose of Section 7 of the Technical Changes Act.

The original predecessor of Section 811 (c), so far as material here, required the inclusion in the dece-

dent's gross estate only of transfers intended to take effect in possession or enjoyment at or after the decedent's death. In *May* v. *Heiner,* 281 U. S. 238, this Court held that a transfer in trust under which the grantor retained a life interest in the transferred property was not a transfer intended to take effect in possession or enjoyment at or after death within the language of the statute. As explained in *Hassett* v. *Welch,* 303 U. S. 303, the Government's attempts to secure a reversal of that holding resulted in its affirmance in 1931 in three other cases, and Congress thereupon amended the section prospectively by Joint Resolution of March 3, 1931, c. 454, 46 Stat. 1516, and later by Section 803 (a) of the Revenue Act of 1932, c. 209, 47 Stat. 169, to bring within the coverage of the statute those transfers under which decedents had retained a life interest in the property. But the retention of a life interest in transferred property was not deemed to make the transfer one intended to take effect in possession or enjoyment at or after death within the meaning of the statute until this Court's decision in January 1949 in *Commissioner* v. *Estate of Church,* 335 U. S. 632 (a case involving a pre-1931 transfer), overruling *May* v. *Heiner, supra.* On the same day, this Court decided *Spiegel* v. *Commissioner,* 335 U. S. 701, in which, in line with the trend of decisions of the Courts of Appeals, a somewhat remote possibility of reverter to the decedent (without a life interest) was held to require the inclusion of the value of the transferred property in the decedent's gross estate. Section 7 of the Technical Changes Act of 1949, *supra,* was then enacted to ameliorate the retro-

active effect of these two decisions. But Section 7 of the latter Act was not intended to relieve from inclusion in a decedent's gross estate those *post*-1931 transfers such as are here involved under which the decedent had retained a life interest. Instead, subsection (b) of Section 7 specifically stated that Section 811 (c) (1) (B) of the Code (relating to transfers with retention of a life interest) should not apply to those transfers made *prior to March 4, 1931* (when by joint resolution the provision relating to retention of a life interest was expressly incorporated in the statute).[2] The transfers here involved were made subsequent to 1931, with a retained life estate, and clearly are includible in the decedent's gross estate under Section 811 (c) (1) (B). Whether they are so includible is the only question actually presented.

Since the decision in *Commissioner* v. *Estate of Church, supra,* it seems clear that the value of joint and survivor annuities would be includible in gross

[2] As to transfers made after March 3, 1931, and prior to June 7, 1932, the exclusion applied only if the transferred property would not have been includible in the decedent's gross estate by reason of the amendatory language of the Joint Resolution of March 3, 1931. Section 7 (b) of the Technical Changes Act of 1949 provided that Section 811 (c) (1) (B) of the 1939 Code should not apply to such transfers "in the case of a decedent dying prior to January 1, 1950" (amended by Section 808 of the Revenue Act of 1951, c. 521, 65 Stat. 452, to read "January 1, 1951"), and these exclusion provisions were carried into Section 811 (c) (1) of the 1939 Code by Section 207 (a) of the Technical Changes Act of 1953, without any limitation based on date of death. A similar exclusion provision is contained in Section 2036 of the Internal Revenue Code of 1954.

estate under the broad language of earlier statutes taxing transfers intended to take effect in possession and enjoyment at or after death, but they are more directly includible under the specific provisions of Section 811 (c) (1) (B) of the 1939 Code relating to transfers under which the decedent has retained a life interest. While this results in some overlap between paragraphs (B) and (C) of Section 811 (c) (1), the two interests (transfers with a retained life interest and transfers with only a reversionary interest) receive different treatment under other provisions of that section. Paragraph (B) relates to transfers subject to a retained life interest, which were excluded from the gross estate by the decision in *May* v. *Heiner, supra* but were later included in the gross estate by statutory enactment. As to these, Section 811 (c) (1) specifically excludes such transfers made prior to the 1931 statutory inclusion.[3] But there is no basis for erecting a further exclusion merely because such transfers might be also excluded under paragraph (C) by reason of the absence of a reversionary interest. Paragraph (C), although embodying the broad language of earlier statutes, primarily is directed to transfers in which no interest was intentionally retained by the decedent, but which were includible under *Spiegel* v. *Commissioner, supra,* because of the possibility of reverter. As to such transfers, subsections (2) and (3) of Section 811 (c) prescribe limitations upon their includibility, depend-

[3] First, by Section 7 (b) of the Technical Changes Act of 1949 and later by inclusion of this limitation in Section 811 (c) (1) by Section 207 (a) of the Technical Changes Act of 1953.

ing upon whether the transfers were made before or after October 7, 1949.[4]

In the light of the above discussion, the cases on which petitioner relies (Pet. 10–14) are clearly distinguishable from the present case. In *Higgs' Estate* v. *Commissioner,* 184 F. 2d 427 (C. A. 3d), the decedent became entitled in 1934 to an annuity under an employee's pension contract with respect to which his employer had paid all of the premiums. In 1934, under an option granted therein, the decedent elected to receive a lesser annuity with a survivorship annuity payable to his wife. Decision in that case was based on the grounds that the decedent did not purchase the joint and survivorship annuity, his employer having paid the premiums, and that the only transfer, if any, was his exercise of the option to take a lesser annuity and provide a survivorship annuity. Since he retained no interest in the survivorship annuity, the court held that exercise of the option was not a transfer as contemplated by Section 811 (c) (1) (B), but taxable, if at all, under Section 811 (c) (1) (C) and therefore exempt under Section 811 (c) (2). See also *Libbey* v. *United States,* 147 F. Supp. 383 (N. D. Calif.).

[4] Subsections (2) and (3) of Section 811 (c) apply only to transfers includible under paragraph (C), while the limitations of Section 7 (b) of the Technical Changes Act of 1949 later added to the Code by Section 27 (a) of the Technical Changes Act of 1953, apply only to transfers includible under paragraph (B). Both petitioner's statement of the question (Pet. 2) and discussion (Pet. 6–14) indicate some confusion as to the applicability of these provisions.

In *Pruyn's Estate* v. *Commissioner*, 184 F. 2d 971 (C. A. 2d), the decedent purchased joint and survivorship annuities *prior to 1931*. The court specifically recognized that the decedent had thereby "contracted for a life estate on her own behalf" (p. 972), but of course the transfer could not be included in the decedent's gross estate because Section 7 of the Technical Changes Act of 1949, *supra*, had been enacted in the meantime, specifically making Section 811 (c) (1) (B) inapplicable to transfers prior to 1931. The fact that the court's *per curiam* opinion indicates that dismissal of the appeal was based on Section 811 (c) (2), under which it was also excluded, does not result in a conflict with the present case.

CONCLUSION

The decision of the Court of Appeals is correct, is not in conflict with any other decision, and presents no important question requiring review by this Court. Accordingly, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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